

Franchise Tax Board**ANALYSIS OF ORIGINAL BILL**

Author: Leno/Maze Analyst: Deborah Barrett Bill Number: AB 1393
Related Bills: See Legislative History Telephone: 845-4301 Introduced Date: February 23, 2007
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: Public Record Disclosure/State Agency Internet Web Sites/Public Records Center/Authorize Persons To Request To Inspect Or Receive Public Records

SUMMARY

This bill would require a state agency to include specific information on its web site about requesting copies of public records.

PURPOSE OF THE BILL

According to the author's staff, the purpose of this bill is to ensure the public has access to the public records to which they are entitled.

EFFECTIVE/OPERATIVE DATE

This bill would be effective January 1, 2008, and apply to requests made on or after that date. The provisions relating to Internet posting and to court actions and awards for failure to do so would be operative on January 1, 2009.

POSITION

Pending.

ANALYSISFEDERAL/STATE LAW

The Freedom of Information Act (FOIA) generally provides that any person has the right to request access to federal agency records or information. All agencies of the Executive Branch of the United States (U.S.) Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by law. Federal agencies are given 20 days to determine whether the agency is able to comply with the information request and notify the requestor of their determination. FOIA directs each federal agency to provide an electronic access mechanism for disseminating records to the public and requires the federal government to publish a list of its systems of records.

Board Position:

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Department Director

Date

Lynette Iwafuchi
for Selvi Stanislaus

5/11/07

The U.S. Department of Justice's Office of Information and Privacy is the principal contact point within the executive branch for advice and policy guidance on matters pertaining to the administration of FOIA. The U.S. Department of Justice's Internet site maintains a list of principal FOIA contacts for each federal agency. The list contains the name of the principal contact, address, phone, and, in some instances, the e-mail address. Each federal agency is responsible for meeting its FOIA responsibilities for its own records.

Under the California Public Records Act (PRA), every person is allowed to inspect and obtain copies of public records that are not exempt from disclosure. If a portion of the record is confidential, the person generally may obtain the remainder of the record after that portion has been redacted.

Currently, the PRA requires that all state and local agencies make public records available for public inspection during office hours, unless exempted by law. The act further requires that if a state agency withholds any public record, it must demonstrate that: (1) the record was exempt from disclosure, or (2) the public interest for nondisclosure outweighed the public interest for disclosure.

Within 10 days after receiving a request for a record, each agency must determine whether the request seeks public records that are in the agency's possession and can be disclosed. In unusual circumstances, the 10-day time limit may be extended. The agency then must provide the requester with a written notice, explaining the reasons for the extension and the date on which a determination can be expected to be provided. Upon request of an identifiable record, the agency is required to make the record available promptly to the requester once the duplicating or statutory fee is paid.

In addition, Executive Order S-03-06 signed by Governor Schwarzenegger on March 29, 2006, requires state agencies to establish or review their written guidelines for accessibility of records; identify and designate members of their staff who are primarily responsible for receiving and responding to PRA requests; and submit a written certification to the Legal Affairs Secretary that the designated staff members have been trained on the responsibilities and requirements of the PRA.

THIS BILL

This bill would require every state agency that maintains an Internet site to include on the homepage the words "Public Information Center" displayed clearly without scrolling. Those words would be followed by or would link to another page showing all of the following:

- Under the words "Whom to Contact," the title, mailing address, telephone number, and e-mail address of the public information officer or other person(s) to whom requests for inspection or copying of records or informal requests for simple factual information should be directed.

- Under the words "How to Request Records," the written procedures in the form of guidelines or regulations for accessing public records at the agency and a form in HTML language for submitting online requests consisting of all the following labeled fields:
 - Today's date.
 - My name (optional).
 - My e-mail address (optional).
 - My postal address (optional).
 - My telephone number (optional).
 - I am interested in the following records or information.
 - Where can I inspect these records?
 - Send me copies of the records.
 - Send me a fee estimate before copying.

Under this bill's provisions, a person could institute legal proceedings against a state agency that fails to post information at its office or on its Internet web site.

The HTML form would be designed to send a copy of the request immediately and automatically to the e-mail address from where it was sent, if the email address was provided by the submitter. These requirements are operative as of January 1, 2009.

This bill would provide that a person may request Attorney General (AG) review of a state agency's denial of a written request to inspect or receive a copy of a public record by delivering a copy of the request and the agency's response to the AG within 20 days of receipt of the agency's written denial. If a state agency failed to provide any response to the request, the person may seek review by the AG by providing a copy of their request and the circumstances under which it was sent to the agency no less than 20 days and no more than 40 days after the request was delivered or mailed to the agency. The AG can extend the 40-day limit upon a showing by the person seeking relief that they refrained from requesting review within the 40-day limit because the person reasonably relied upon representations from the agency that a response would be forthcoming.

This bill would establish guidelines for AG review of a state agency's denial of a public records request, including timeframes under which the resulting opinion regarding whether the agency complied with the law is issued. Requesting a review of the denial by the AG does not affect the right of a person to enforce their right to inspect or receive a copy of any public record through a court action.

Under this bill, if a person elects to bring an action against a state agency, the AG will not review the decision of the agency. No legal action may be brought against the agency where its decision is the subject of the action until 10 days after the issuance and mailing of the opinion. A state agency may retain counsel other than the AG after the receipt of an adverse decision by the AG.

This bill would authorize a court to award a plaintiff an amount not to exceed \$100 per day if the court finds an agency acted in bad faith or reckless disregard of the agency's obligations under the PRA in denying a public record request, where the agency:

- Declined to comply with a request to inspect or copy a record that is publicly accessible;
- Delayed in responding or producing the requested records without stating a reason or the reason is unsupported by compelling circumstances or otherwise demonstrated a lack of diligence required to make the records available promptly;
- Imposed conditions not authorized under the PRA, including requesting payment in excess of applicable statutory fee; or
- Otherwise delayed timely and complete access.

An award may not exceed \$10,000.

This bill would require a court, when determining an award amount, to consider all the facts and circumstances surrounding the agency's decision including, but not limited to the following:

- Whether the agency unreasonably failed to respond within the set timelines or otherwise engaged in conduct that caused undue delay.
- Whether the agency's justification for denying the request was reasonably based upon its perceived obligation to protect the rights of persons or entities identified in the requested records.
- Whether the agency has developed publicly assessable internal operating procedures and guidelines.
- Whether the plaintiff acted in good faith while pursuing the request.
- Whether the agency's denial or other conduct inconsistent with the provisions of this bill was based on a reasonable interpretation of the law.

Comment [t11]: Page: 3
This would be a technical tweak to the bill text. /// DVB: Tommy, as the court is deciding whether the agency was reasonable in denying the request, does it matter whether this factor is stated as "reasonably based upon" or "reasonable, based upon . . ." its perceived obligations?//no change made//db

This bill would outline the duties of the court if a plaintiff brings an action against an agency for failure to comply with the requirements under this bill.

In addition, this bill would provide for the establishment of an advisory task force that would be convened by the Department of Justice to consider and make recommendations for a statutory standard governing the postings of requests and denials and public documents that are subject to disclosure. The bill prescribes the membership of the task force and also prescribes the issues the task force is to consider. The bill would require the task force to report its findings and recommendations to the Governor and the Legislature by no later than September 30, 2008, at which time the task force would cease to exist.

IMPLEMENTATION CONSIDERATIONS

This bill would have a significant impact upon the department. The department has identified the following implementation concerns. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

The PRA currently requires an interactive process between the requester and a state agency to clarify, assist, and identify appropriate records. FTB's Disclosure Officer administers the department's obligations under the PRA by working with a requester if the description of a record is unclear. Under this bill, it appears that the requester could remain anonymous for requests made on the web site. Anonymity of the requester could frustrate the current interactive process of the PRA.

The bill requires that the Public Record Center link be prominently displayed without scrolling on the home page of the web site. FTB cannot ensure that the link would be accessible by all users as prescribed because of the wide variety of devices used to access the website. For example, taxpayers can access FTB's website through small, hand held instruments, such as a Blackberry device, that would require scrolling for almost any information found on the website due to monitor size. The author may wish to identify a standard for screen placement the limitations of which take into account variations in technology among users.

The bill specifies that the form must be designed using the HTML format. Prescribing the format would restrict the use of alternative or future technology that could lead to increase costs to maintain this prescribed format once it is made obsolete. The author may wish to amend the provision to specify HTML, alternate, or successor technology.

Because the HTML form prescribed by this bill makes the requester's postal address and phone optional, it might be difficult for the department to send the requester paper copies of records. To ensure the requested records are provided in compliance with the provisions of this bill, the form should require the requester's postal address.

This bill uses terms that are undefined, i.e., "pending proceeding" and "pending investigation." The absence of definitions to clarify these terms could lead to disputes with taxpayers particularly in determining whether audits, protests, reviews of claims for refund, or appeals comprise a "pending investigation" or a "pending proceeding." The author may wish to provide definitions of the terms to prevent any possible misinterpretations.

LEGISLATIVE HISTORY

AB 2927 (Leno, 2005/2006) would have implemented similar provisions relating to the accessibility of public records, including referrals to the AG for review of a denied request and court awards for an agency acting in bad faith. This bill was vetoed by Governor Schwarzenegger. In the veto message, Governor Schwarzenegger stated, "In addition, the provision allowing the Attorney General to review denials of public records requests is unduly burdensome. The Attorney General is the attorney for most State agencies and advises agencies on responding to such requests and thus this bill creates an inherent conflict of interest."

AB 1014 (Papan, Stats. 2001, Ch. 355) requires a state or local agency to estimate the date and time when a public record that can be disclosed would be made available. This law also requires a state or local agency to identify, describe, and assist the requester with reasonable options to obtain records responsive to their request or inquiry.

AB 2799 (Shelley, Stats. 2000, Ch. 982) requires a denial of requests for public records to be in writing.

SB 48 (Sher, 1999/2000) and SB 2027 (Sher, 1999/2000) would have amended the California Public Records Act to require that state agencies justify the withholding of any record by demonstrating in writing that a record is exempt from disclosure or the public interest is served by not making the record public. These bills would have established a procedure to allow any person to appeal to the AG if a state or local agency denies access to a public record or subverts the intent of the bill by actions short of denial of inspection. SB 48 was vetoed by Governor Davis. The veto message states, "SB 48 creates an Attorney General appeal process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments. Consequently, this bill could result in uneven legal representation and increased use of costly outside counsel by the agency or department. Finally, the costs to comply with this bill would be borne by the General Fund and would likely be significant. The bill sets up a bureaucratic reporting mechanism, involving the preparation, posting and mailing of AG opinions on the merits of a state agency's decision to withhold requested information. The costs to comply with this bill would be borne by the General Fund and would likely be significant."

AB 179 (Bowen, 1997/1998) would have required any agency that has public information to provide the information in an electronic format upon request and that direct costs of duplication include the costs related to duplicating the electronic record. This bill was vetoed by Governor Pete Wilson. The veto message states, "A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it 'unreasonable.' Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done."

FISCAL IMPACT

Implementing this bill would require the department to revise the department's existing Internet web site and to develop an online form for requesting public records. In addition, it would require additional staff to respond requests received through the Internet interface. In instances where FTB had to retain outside counsel to represent it in a court case, FTB would incur additional expenses. A cost estimate will be developed as the bill progresses through the legislative process.

ECONOMIC IMPACT

This bill would not impact state income tax revenues.

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